

2011 Arkansas Agritourism Initiative Legal Protections Against Risk

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What we'll cover today

- Concepts of Negligence & Premises Liability
 - ▣ Most common cause of action
 - ▣ Your duty of care as a land owner

- The Arkansas Recreational Use Statute
 - ▣ Benefits to land owners in Arkansas
 - ▣ Whether it applies to your agritourism operation

- Business Organizations

- New Arkansas Agritourism Act

It's always about the FACTS

5

- Sometimes it can be hard to answer a legal question with specificity
- Each situation is different based on the facts
- Courts make determinations of FACT before they apply the law
- Often the answer is “It depends!”
 - The facts of your specific situation may change the outcome



6

Premises Liability

The notion of people on your land and how YOU- the landowner - may be liable.

Basic legal concepts

7

- Premises Liability is based on the notion of negligence
 - ▣ failure to exercise the care that a reasonably prudent person would exercise in like circumstances

Negligence

8

- There are 4 parts to a cause of action for negligence
 - Duty of Care
 - Your responsibilities as a landowner; different in each situation
 - Typically the “reasonable person” standard
 - Breach of Duty
 - A failure on your part regarding your responsibilities
 - Causation
 - Your failure caused the “injury”
 - Damages
 - There must be an actual harm that can be redressed

Liability Issues

- So now there are people on your land...
 - How did they get there?
 - Did you invite them or charge them to come onto your land?
 - Did they ask your permission? Are you allowing them to enter for free?
 - Are they trespassing? Are you aware of their presence?

Liability Issues

10

- 3 Categories of People on Your Premises
 - Trespasser
 - Lowest duty of care
 - Licensee
 - Higher duty of care than trespasser, but less than invitee
 - Invitee
 - Highest duty of care

Liability Issues: Trespasser

11

- Trespasser
 - ▣ Entered upon land without permission or invitation
 - ▣ Knowledge of trespasser
 - No knowledge - no duty, no liability
 - Knowledge - duty not to affirmatively harm
 - A course of action which shows a deliberate intention to harm or utter indifference to, or conscious disregard of, the safety of others
 - ▣ Example: Teenagers going out to your pond and fishing without your permission

Liability Issues: Licensee

12

- Licensee
 - ▣ Present for a non-commercial, non-business purpose with the consent of the possessor of the property, such as a social guest at someone's residence

Liability Issues: Licensee

□ Your Duty:

- Refrain from injuring the person through willful or wonton conduct
 - I.e., deliberate behavior
- Warn of hidden dangers where the person does not know or is unlikely to know of the conditions or risks

□ Example:

- Someone asks for permission to hunt, walk, use land without a fee
 - Need to warn of the bull on the back 40 that isn't fenced in

Liability Issues: Invitee

14

□ Invitee

- Person who is invited upon the premises in order to conduct business with the possessor
- Came on the land for *your* benefit
 - Customers in store or shopping center
 - Employees
 - Students
 - Business visitor

Liability Issues: Invitee

15

- Your duty:
 - ▣ Highest duty of care
 - ▣ A general duty to use ordinary care to keep the premises reasonably safe for the benefit of the invitee
 - This means making sure your employees have safe equipment, facilities, proper training, etc.

Status of Entrant

16

- The status of a person on your land can change.
 - For example -
 - If you allow someone to fish in your pond, but they explore other parts of your land, they may change from a licensee to a trespasser
- It is important to define the area that visitors have permission to use.

Where Are We?

We've covered Premises Liability and Negligence.

Now we'll talk about the **Arkansas Recreational Use Statute**.

AR Recreational Use Statute

18

- Every state has a recreational use statute
- The Arkansas statute is unique
- Purpose:
 - To encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability towards entering thereon for such purposes
- So a landowner who allows recreational users to use his or her land without a “charge” has limited liability

AR Recreational Use Statute

- No state or federal case has interpreted the AR statute in an agriculturally related context
- We have to look to other decisions which mention the statute

AR Recreational Use Statute

20

- An Arkansas “owner” owes no duty of care “to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure or activity on the premises to persons entering for recreational purposes”
- Some key exceptions

AR Recreational Use Statute

21

□ Key Definitions

- Land: land, roads, water, private ways, buildings, structures and machinery or equipment attached to the realty
- Owner: possessor of a fee interest, tenant, lessee, holder of conservation easement, occupant, or person in control of premises
- Recreational Purpose: hunting, fishing, swimming, boating, camping, pleasure driving, nature study, water skiing, viewing or enjoying historical, archeological, scenic or scientific sites.

AR Recreational Use Statute

22

□ Key Definitions

- Charge: admission fee for permission to go upon or use the land

- Charge does NOT include: sharing of game, fish, or other products of recreational use, or contributions in kind, services or **cash paid to reduce or offset costs and eliminate losses from recreational use**

- This is likely where a challenge will arise as to whether the statute applies to you

AR Recreational Use Statute

23

- Statute makes it clear that the landowner may receive game, fish, or other products of recreational use
 - ▣ Hunter's share of wildlife is not a charge
 - ▣ This is not the case in all states

AR Recreational Use Statute

- Cash paid to landowner to “reduce or offset costs and eliminate losses from recreational use”
 - Could possibly include the cost of insurance
 - Could possibly also include costs associated with building and maintaining duck blinds, food plots and other items associated with hunting activities

AR Recreational Use Statute

25

- Interpretation of “admission fee for permission to go upon or use the land”

- Pumpkin Patch Example
 - No charge for entering, only a charge if you purchase a pumpkin
 - Customer injured on the way to the car after purchase of pumpkin
 - 8th Circuit has interpreted similar statutes - not a charge

AR Recreational Use Statute: Exceptions

26

- Protections are NOT ABSOLUTE
 - Still liable for any malicious, but not merely negligent, conduct or failure to warn against ultra hazardous conditions or activities
 - High standard, but we don't know for sure what this means
 - Still liable for injury suffered in any case where the owner charged to enter the land for recreational purposes

Exception to the Exception

27

- “In the case of land leased to...a third person, any consideration received by the owner for the lease shall not be deemed a charge”
 - **One interpretation of this language**
 - **Compensation received by landowner under a leasing arrangement is not a “charge” so you may have the protections of the Recreational Use Statute**

What's Next?

Business Organization options to protect your personal and business assets.

Business Organizations

Options for your enterprise

Types of Business Structures

30

- Sole Proprietorship
- General Partnership
- Limited Partnership
- Limited Liability Corporation
- Corporations
 - Subchapter “S”
 - Subchapter “C”

Issues to consider for each one

31

- Liability of Owners
- Legal Status
- Formation
- Management
- Taxation

Sole Proprietorship

32

□ Liability of Owners

- 100% liability for the business debt

- Creditors will be able to reach your personal assets as well as what you invested into the business.

□ Legal Status

- Not a separate legal entity

- You would be sued directly.

Sole Proprietorship

33

- Formation
 - No formalities are required
 - Formed or dissolved at the discretion of the individual who owns it
 - Only 1 person, or it becomes a partnership
- Management
 - Easy decision making – only one person to consult!
- Taxation
 - Income is taxed on the individual's tax return
 - Schedule C

General Partnership

34

□ Definition

- An association of two or more “persons” who agree to carry on as co-owners of a business for profit.
- No intent is necessary to form a general partnership

General Partnership

35

□ Liability

- Each partner is **jointly and severally** liable for the debts of the business
- Creditors can reach your personal assets, in addition to what you have invested into the business

General Partnership

36

□ Legal Status

- Recognized as a separate legal entity

□ Formation

- No formalities are required

- Can be formed unintentionally (only intent required is to run business for profit)

- There can be a formal partnership agreement that details management responsibilities and how profits/losses will be split

General Partnership

37

□ Management

- Each member of the partnership is called a “general partner”
- The decisions are made by all partners and all partners actively participate
- Profits and losses are split evenly
 - Unless the partnership agreement states otherwise

General Partnership

38

□ Taxation

- The general partnership has the advantage of being a “pass-through entity”
- This means the partnership itself pays no income taxes
- Instead, income is taxed only after it is distributed to the partners.
- This is different than the “double tax” where income is taxed when the business earns it and when it is paid out to the individual partners.

Limited Partnership

39

□ Limited Liability Partnership

- A more formal business organization that limits some liability

□ Liability

- General Partner

- Is fully liable for the financial and legal obligations of the business

- Limited Partner

- Only at risk of losing the capital invested or pledged to the business

- Personal assets are not at risk

Limited Partnership

40

□ Legal Status

- Separate legal entity

□ Formation

- Requires at least 1 General partner and 1 Limited partner

- Requires a partnership agreement that lays out how the business will be run, including how profits/losses will be divided

- Certificate must be filed with Secretary of State

- Name of business must have “limited” or “LLP”

Limited Partnership

41

□ Management

- The General partner manages the business

- Policy reasons: General partner has the most at stake.
Incentive to make sound business decisions

□ Taxation

- Limited Partnership is also a “pass-through entity”

- Income is only taxed after it is passed on to the general or limited partners.

Limited Liability Company (LLC)

42

□ LLC

- Similar to Limited Partnerships
- Provides protection to personal assets
- Made up of “members” rather than “partners”

□ Liability

- Members’ personal assets are protected from creditors of the business.
- Creditors can (usually) only reach that which has been invested or pledged to the business

LLC

43

- Legal Status
 - Recognized as separate legal entity
- Formation
 - Can be formed with 1 or more members
 - Created by delivering Articles of Organization to the Secretary of State's office
 - Must include
 - Name of LLC
 - Address of LLC
 - Agent for service of process
 - Certain reports must be filed each year to maintain LLC status

LLC

44

□ Management – 2 options

-Member Management

- All members have the right to participate in management

- This is the more common option

-Manager Management

- Only designated members have management authority as provided in articles of organization

- Profits and losses are shared equally among members unless otherwise agreed

LLC

45

□ Taxation

- The LLC can elect to be a “pass-through entity”

 - Income is taxed only when it is distributed to the members

- Or the LLC also has the option of being taxed as a corporation

 - Income would be taxed when the LLC earns it and again when it is distributed to the members

Corporations

46

- Most complex business organization
- Offer liability protection for shareholders
 - Similar to that of LLC

Corporations

47

□ Liability

- Shareholders are protected from creditors of the corporation in most cases

□ Legal Status

- Corporation is a separate legal entity

Corporations

48

□ Formation

- Articles of incorporation must be filed with Secretary of State

- Must include

- Name of corporation

- Purpose of corporation

- Stock structure

- Fictitious name statement

- By Laws

- Include details of how the corporation will be run

- Officers

- Shareholder meetings

- Number and terms of Directors on Board

Corporations

49

□ Formalities

- Record keeping requirements
- Regular board meetings
- Annual shareholder meetings
- Annual filing requirements for the state

Corporations

50

□ Management

- Shareholders elect a Board of Directors
- Board of Directors appoint Officers
 - Officers are responsible for day-to-day management decisions
 - Board of Directors is responsible for long term planning and management
 - Shareholders have limited management authority and vote only on extraordinary measures
 - Like selling more than 1/2 of the assets or dissolving

Types of Corporations

51

□ S Corporation

- Limited number of shareholders
- “Legal persons” that are allowed to be shareholders is limited to citizens, resident aliens, estates and certain trusts
 - No corporations, non-resident aliens
- Only one class of voting stock
- Distribution rights to shareholders must be equal
- No tax at the corporate level
 - Similar to taxation of LLC

Types of Corporations

52

□ C Corporation

- Unlimited number of shareholders
- No limits on who (or what legal entities) can be shareholders
- Can issue common or preferred stocks or bonds
- Distribution rights are very flexible
- Income is taxed at the corporate level
 - And then again when it is distributed to shareholders

How to choose!

53

- Deciding which business structure to use is an important decision.
- Many factors to consider
 - Who is involved
 - What is their role
 - What are the requirements
 - What makes the most sense for my business

Arkansas “Agritourism Act”

- Enacted in 88th General Assembly
- Purpose is to promote rural tourism and rural economic development by limiting civil liability for agritourism operators
- We will examine some of the key features and definitions of the Agritourism Act

Agritourism Act – “Agritourism Activity”

- An “Agritourism activity” means an interactive or passive activity carried out with or without payment to an agritourism activity operator on a farm, ranch, or agribusiness operation related to agriculture, food production, historic traditions, or nature-watching conducted by an agritourism operator for the education, entertainment, or recreation of participants

Agritourism Act – “Agritourism Activity”

- “Agritourism activity” includes without limitation:
 - ▣ A farming or ranching activity;
 - ▣ The viewing of historic, cultural, or natural attractions;
 - ▣ A harvest-your-own activity;
 - ▣ Nature-watching; and
 - ▣ An activity involving an animal exhibition at an agricultural fair.

Agritourism Act – “Agritourism Activity”

- An “agritourism activity” does NOT include:
 - A road site fruit and vegetable stand; or
 - An operation exclusively devoted to the sale of merchandise or food at retail.

Agritourism Act: Limitation on Liability

- An agritourism activity operator is NOT liable for damages arising from participant injury or death IF:
 - ▣ The injury or death results from an **inherent risk**; and
 - ▣ the warning contained in §2-11-107 is posted

Agritourism Act – Inherent Risk

- Includes dangers or conditions that are an integral part of an agritourism activity including without limitation:
 - The propensity of wild or domestic animals to behave in ways that could cause injury or death;
 - Surface and subsurface conditions;
 - Natural conditions of land, vegetation, and waters;
 - Ordinary dangers of structures or equipment used in farming or ranching operations; and
 - A participant's own negligent behavior that causes injury to the participant or others

Agritourism Act – Warning Required

- At each agritourism activity, the operator “shall post and maintain signage in a clearly visible location at or near the main entrance . . . and in black letters at least one inch in height the following warning:

(cont'd)

Agritourism Act – Warning Required

“WARNING – Under Arkansas law, an agritourism activity operator is not liable for the injury or death of a participant in an agritourism activity resulting from the inherent risk of agritourism activities. Inherent risks include without limitation the risk of animals, weather, land conditions, and the potential for you as a participant to act in a negligent way that may contribute to your own injury or death. You are assuming the risk of participating in this agritourism activity.”

Agritourism Act – Warning Required

- The law also states that the agritourism operation shall include, in clearly visible print, the warning contained in subsection (a) of this section in a written contract between the agritourism activity operator and each participant.
 - This could create some confusion
- Also states that at each agritourism activity, the operator shall post and maintain signage of a specific or known hazard in the particular area on or surrounding the agritourism activity

Agritourism Act – Operator Liability

- Liability exists if the operator (or his or her agent):
 - Commits an act or omission of gross negligence concerning the safety of a participant;
 - Has actual knowledge of a dangerous condition and does not make the danger known to the participant;
 - Intentionally injures a participant; or
 - Commits other acts, errors, or omissions that constitute “willful or wanton misconduct, gross negligence, or criminal conduct”

Comments/Conclusions

- Think of liability in terms of risk management
- Insurance is a critical part of the risk management equation
- Legal risk and issues is an important of any enterprise, and agritourism is certainly no exception



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